

ITEL
Pullman
November 8, 1989

Itel Rail Corporation

55 Francisco Street
San Francisco, CA 94133
(415) 984-4000
(415) 781-1035 Fax

16602

RECORDATION NO. _____ FILED 1425

NOV 13 1989 - 11 30 AM

INTERSTATE COMMERCE COMMISSION

9-317A004

Hon. Noreta R. McGee
Secretary
Interstate Commerce Commission
Washington, DC 20423

Re: Lease Agreement dated October 13, 1989, between Itel Rail Corporation and Western Rail Road Company

Dear Ms. McGee:

On behalf of Itel Rail Corporation, the above instrument, in three (3) counterparts, is hereby submitted for filing and recording pursuant to 49 U.S.C. Section 11303(a), along with the \$15 recordation fee.

Please record this Lease Agreement under a new recordation number.

The parties to the aforementioned instrument are listed below:

Itel Rail Corporation (Lessor)
55 Francisco Street
San Francisco, California 94133

Western Rail Road Company (Lessee)
5101 Navigation Street
Houston, Texas 77011

This Lease Agreement sets forth the terms and conditions by which equipment is leased.

Please return to the undersigned the stamped counterparts not required for filing purposes, together with the ICC fee receipt and acknowledgment letter.

Very truly yours,

Patricia Schumacker

Patricia Schumacker
Legal Assistant

RECEIVED
63 NOV 13 11 30 AM

Interstate Commerce Commission
Washington, D.C. 20423

11/14/89


OFFICE OF THE SECRETARY

Patricia Schumacker
Legal Assistant
Itel Rail Corporation
55 Francisco St.
San Francisco, Calif. 94133

Dear Sir:

The enclosed document(s) was recorded pursuant to the provisions of Section 11303 of the Interstate Commerce Act, 49 U.S.C. 11303, on 11/13/89 at 11:30am and assigned recordation number(s). 16602, 16602-A 6643-V & 15514-C

Sincerely yours,


Noreta R. McGee
Secretary

Enclosure(s)

NOV 13 1989 -11 30 AM
INTERSTATE COMMERCE COMMISSION**LEASE OF RAILROAD EQUIPMENT**

THIS LEASE AGREEMENT ("Agreement") is made as of this 13TH day of OCTOBER, 1989, by and between ITEL RAIL CORPORATION, a Delaware corporation located at 55 Francisco Street, San Francisco, California 94133, as lessor ("Lessor"), and WESTERN RAIL ROAD COMPANY, a Texas corporation, located at 5101 Navigation Street, Houston, Texas 77011 as lessee ("Lessee").

1. Scope of the Agreement

- A. Lessor agrees to lease to Lessee and Lessee agrees to lease from Lessor, upon the terms and conditions set forth herein and in the Schedule(s) attached hereto, a number of items of equipment bearing the reporting marks and of the type, construction and other description set forth in Schedule No. 1 attached hereto. "Cars" shall mean all items of equipment subject to this Agreement and "Car" shall mean an individual item of equipment.
- B. It is the intent of the parties to this Agreement that Lessor shall at all times be and remain the owner and lessor of all Cars and that no joint venture or partnership is being created. Lessee's interest in the Cars shall be that of a lessee only. Lessee agrees that it will at no time take any action or file any document which is inconsistent with the foregoing intent and will take such action and execute such documents as may be necessary to accomplish this intent.

2. Term

This Agreement shall remain in full force until it is terminated as to all of the Cars as provided herein. The term of this Agreement with respect to the Car(s) listed on Schedule No. 1 attached to the Agreement shall be as set forth on such Schedule No. 1.

3. Supply Provisions

Lessee hereby approves the specifications of the Cars described on Schedule No. 1. Each Car shall be deemed delivered and subject to the terms and provisions of this Agreement on the date set forth in the applicable Schedule. Commencing upon Delivery (as defined in Schedule No. 1), Lessee shall be liable for all costs, charges and expenses on account of or relating to transportation or movement of any Car. If Lessor is required to pay any such amount, Lessee shall reimburse Lessor within thirty (30) days of receiving an invoice from Lessor for such

amount. Lessee covenants that it shall observe the Association of American Railroads interchange rules adopted by the AAR Mechanical Division, Operations and Maintenance Department for the duration of this Agreement.

4. Record Keeping

- A.** Lessee shall prepare and file all documents relating to the registration, maintenance and record keeping functions normally performed with respect to railroad equipment of the type subject to this Agreement including, but not limited to: (i) preparation of appropriate Association of American Railroads ("AAR") interchange agreements with respect to the Cars; (ii) registration of the Cars in the Official Railway Equipment Register and the Universal Machine Language Equipment Register ("UMLER"); and (iii) preparation of any reports as may be required from time to time by the Interstate Commerce Commission ("ICC") and any other regulatory agencies with respect to the Cars.
- B.** If any Cars are placed into an assignment pool, documents relating to the assignment pool shall be handled by the pool operator. All other record keeping functions relating to the use of the Cars by Lessee and railroads, including but not limited to car hire reconciliation, collection and receipt of revenues from other railroad companies, records pertaining to maintenance and repair, and billing in accordance with the AAR interchange rules adopted by the AAR Mechanical Division, Operations and Maintenance Department ("Interchange Rules") shall be performed by Lessee. The party designated to perform record keeping in the applicable Schedule shall continue to do so for the duration of the Agreement with respect to the Cars described on such Schedule; provided, however, that Lessor, at its option, may assume record keeping for such Cars if Lessee is designated to perform record keeping and desires to transfer its responsibility to do so to a third party. All record keeping performed hereunder and all records of payments, changes and correspondence related to the Cars shall be separately recorded and maintained in a form suitable for reasonable inspection by the other party from time to time during regular business hours. Upon Lessor's request, Lessee shall supply Lessor with telephone reports of the number of Cars in Lessee's possession and control.

5. Maintenance

- A.** Lessee shall perform or cause to be performed and pay all costs and expenses associated with the maintenance of the Cars. Lessee shall make, at its expense, all alterations, modifications or replacement of parts as shall be necessary to maintain the Cars in good operating condition as

specified in the Interchange Rules. Title to any alteration, improvement or addition made shall be and remain with Lessor. Any parts, replacements or additions made to any Car are deemed accessions to such Car and title thereto shall vest immediately in Lessor. "Repair Work" is defined as all repairs, maintenance, or replacements required to keep and maintain the Cars in good working order and repair. All repairs must be made in accordance the Interchange Rules, as amended from time to time.

- B. Lessor has the right to inspect the Cars at any time during normal business hours to ensure that they are in compliance with applicable regulations. If, upon inspection, Lessor reasonably determines that the Cars require maintenance or repairs to bring the Cars up to good working order and put them in compliance with the Interchange Rules, then Lessor reserves the right to perform such maintenance or repairs at Lessee's expense. Any repairs or maintenance performed shall be performed at a labor rate not to exceed the prevailing AAR Labor Rate. All sums due Lessor for such repair work shall be reimbursed to Lessor as additional rent.

6. Tax and Insurance

- A. Lessee shall, at all times while this Agreement is in effect, at its own expense, cause to be carried and maintained: (i) all-risk, physical loss and damage insurance with respect to the Cars while the Cars are on Lessee's tracks or in Lessee's care, custody or control; and (ii) public liability insurance with respect to third party personal injury and property damage, in each case in such amounts and for such risks and with such insurance companies as are reasonably satisfactory to Lessor. All insurance policies shall be taken out in the name of Lessee and shall name Lessor, any financing party designated by Lessor by written notice to Lessee ("Financing Party"), and any assignee of Lessor as additional named insureds and as loss-payees. Said policies shall provide that Lessor, Financing Party and any named assignee of Lessor shall receive thirty (30) days' prior written notice of any material changes in coverage or cancellation thereof. In the event that Lessee fails to place insurance, or that said insurance expires, Lessor has the right to purchase the insurance described above and Lessee shall pay the cost thereof. With respect to the additional insureds, Lessee's insurance policies shall be primary to any other valid and available insurance ("Other Insurance") effected by, or for, the additional insureds. Lessee shall require its insurer specifically to waive subrogation, claim and recovery with respect to any Other Insurance. Any and all deductibles in the described policies shall be paid by

Lessee. Lessor agrees to pay over to Lessee the proceeds of physical loss and damage insurance claims relating to damaged cars to the extent that Lessee has paid for the repair to such Cars.

- B. Each policy obtained by Lessee pursuant to this Section shall be in accordance with the above terms and conditions, which terms and conditions shall be set forth on the Certificate of Insurance provided to Lessor pursuant to this Subsection. Lessee shall furnish to Lessor concurrently with execution hereof, within thirty (30) days of receipt of a written request from Lessor and at intervals of not more than twelve (12) calendar months from execution hereof, Certificates of Insurance evidencing the aforesaid insurance.
- C. Responsibility for taxes for the Cars shall be as set forth on the applicable Schedule hereto.

7. Storage

In the event that any Car(s) is not in use while subject to this Agreement, Lessee shall be responsible for storing any such Car(s) on its lines, at its expense, or for paying all costs associated with storing such Car(s) at another location. Any storage location provided by Lessee which is off Lessee's lines, shall be as secure as if the Cars were stored on Lessee's lines. If Lessor pays any such storage-related costs, Lessee shall reimburse Lessor for such costs within ten (10) days after receiving an invoice from Lessor for such costs.

8. Rent

- A. During the term of this Agreement, Lessee shall pay to Lessor for each Car, commencing on the date of delivery thereof, the monthly rental specified in Schedule No. 1.
- B. Rental payments shall not abate if any Car is out of service for any reason whatsoever.

9. Casualty Cars

- A. In the event destruction or damage beyond repair of a Car has been reported in accordance with Rule 107 of the AAR Field Manual of the Interchange Rules and Car Hire Rules 7 and 8 of the AAR Code of Car Hire Rules and Interpretations-Freight, said destroyed Car ("Casualty Car") will be removed from the rental calculations of this Agreement on the date car hire ceases as set forth in the aforementioned Rules 7 and 8 and Lessor shall be entitled to all casualty proceeds relating to the Casualty Car.

Agreement so long as no event of default under this Agreement has occurred and is continuing, and so long as Lessee attorns to and recognizes such financing party as the lessor hereunder. In the event of a default by Lessor under such financing agreement(s), Lessee agrees to take the aforesaid actions as directed by each secured party with respect to the Cars subject to such secured party's interest.

- B. Lessee shall be responsible for the Cars (i) while in Lessee's possession and control and (ii) in the same manner and under the same circumstances that Lessee is responsible under the Interchange Rules for similar equipment not bearing the reporting marks of Lessee.
- C. Lessee agrees that the Cars shall at all times be used and operated under and in compliance with the laws of the jurisdiction in which the same are operated and in which the same may be located, in compliance with all lawful acts, rules, regulations and orders of any governmental bodies or officers having power to regulate or supervise the use of such property, and in accordance with all rules established by the AAR, except that either Lessor or Lessee may by appropriate proceedings timely instituted and diligently conducted, contest the application of any such act, rule, regulation or order at the expense of the contesting party.
- D. At Lessor's election Cars may be marked to indicate the rights of Lessor, of an assignee, mortgagee, trustee, pledgee or security holder of Lessor, or of a lessor to Lessor. Except for renewal and maintenance of the aforesaid markings or lettering indicating that a Car is leased to Lessee or is assigned in accordance with demurrage tariffs, no lettering or marking shall be placed upon any Car, other than markings currently on such Cars, by Lessee and Lessee will not remove or change any reporting mark or number indicated on the applicable Schedule except upon the written direction or consent of Lessor. Lessee shall be responsible for all costs associated with any marking changes made at its request.
- E. Lessee shall not, with regard to the Cars, or any interest therein, including the revenues thereon, or with regard to the Agreement or any Schedule hereto, directly or indirectly create, incur, assume, or suffer to exist any mortgage, pledge, lien, charge, encumbrance, or other security interest or claim arising by, through, or under it, except those created for the benefit of Lessor or any owner or secured party referred to in Subsection 10.A., hereinabove. Lessee shall notify Lessor in writing within five (5) days after it obtains knowledge that any

attachment, tax lien or other judicial process shall be attached to any Car. Lessee shall promptly, at its expense, take such action as may be necessary to duly discharge any such mortgage, pledge, lien, charge, encumbrance, security, interest, or claim if the same shall arise at any time. If Lessee fails to take action as described in the previous sentence, Lessor may, at Lessee's expense, take such action and Lessee shall pay the cost thereof within ten (10) days of receiving an invoice from Lessor for such costs.

11. Default

- A. The occurrence of any of the following events shall be an event of default:
- (i) The nonpayment by Lessee of any sum required herein to be paid by Lessee within ten (10) days after the date any such payment is due;
 - (ii) The breach by Lessee of any other term, covenant, or condition of this Agreement, which is not cured within thirty (30) days after notice of such breach is sent by Lessor to Lessee;
 - (iii) The breach by Lessee in any material respect of any representation, warranty or covenant set forth in Section 13 hereinbelow;
 - (iv) The filing by or against Lessee of any petition or the initiation by or against Lessee of any proceeding: (a) for any relief which includes, or might result in, any modification of the obligations of Lessee hereunder; or (b) under any bankruptcy, reorganization, receivership, insolvency, moratorium or other laws relating to the relief of debtors, the readjustment of indebtedness, financial reorganization, arrangements with creditors, compositions of or extensions of indebtedness, provided however, that in the case of any petitions or filings initiated against Lessee, any such petition or filing shall not constitute an event of default if it has been dismissed or withdrawn within sixty (60) days of such filing;
 - (v) The subjection of any material portion of Lessee's property to any levy, seizure, assignment, application or sale for or by any creditor or governmental agency;

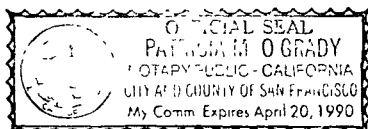
- (vi) Any action by Lessee to discontinue rail service on all or a substantial portion of its track or to abandon any of its rail properties.

B. Upon the occurrence of any event of default hereunder, without limiting Lessor's rights and remedies otherwise provided by law, which shall be available to Lessor in addition to the following rights and remedies (no right or remedy of Lessor being exclusive but all such rights and remedies being available at all times to Lessor, and Lessor, in any case, being entitled to recover all costs, expenses and attorneys' fees incurred by Lessor in enforcing its rights and remedies hereunder), Lessor may, at its option:

- (i) Terminate this Agreement and recover damages, and/or;
- (ii) Proceed by any lawful means to enforce performance by Lessee of this Agreement or to recover damages for a breach hereof, and/or;
- (iii) By notice in writing to Lessee, terminate Lessee's right to possession and use of some or all of the Cars, whereupon all right and interest of Lessee in such Cars shall terminate and the obligation to pay rentals with respect thereto shall also terminate; thereupon, Lessor may enter upon any premises where the terminated Cars may be located and take possession of such Cars and henceforth hold, possess and enjoy the same free from any right of Lessee. Lessor shall, in addition, have the right to recover from Lessee any and all rental amounts which under the terms of this Agreement may then be due or which may have accrued to that date with respect to terminated Cars, together with Lessor's costs and expenses, including reasonable attorneys' fees incurred in securing such enforcement hereof.
- (iv) Without terminating this Agreement repossess the Cars. Lessor may relet the same or any part thereof to others upon such terms as Lessor desires. The proceeds of any such reletting shall first be applied to the expense (including reasonable attorneys' fees) of the retaking and the reletting of the Cars and of their delivery to the new lessee(s), and then to the payment of rent due through the term of this Agreement. Lessee shall pay any deficiency remaining due after the proceeds have been so applied. The election of Lessor to relet the Cars and the acceptance of the

STATE OF CALIFORNIA)
) ss:
COUNTY OF SAN FRANCISCO)

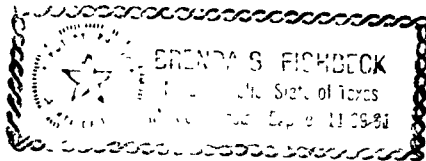
On this 13th day of October, 1989, before me personally appeared Desmond R. Hayes, to me personally known, who being by me duly sworn says that such person is ^{use} ~~President and Chief Executive Officer~~ of Itel Rail Corporation, that the foregoing Lease Agreement was signed on behalf of said corporation by authority of its board of directors, and such person acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.



Patricia M. O'Grady
Notary Public

STATE OF Texas)
) ss:
COUNTY OF Tarrant)

On this 13th day of October, 1988, before me personally appeared B. S. Parker, Jr., to me personally known, who being by me duly sworn says that such person is President of Western Rail Road Company, that the foregoing Lease Agreement was signed on behalf of said corporation by authority of its board of directors, and such person acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.



Brenda S. Fishbeck
Notary Public